




FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Commissioners
Staff Director Pehrkon
General Counsel Noble
Press Office Harris

FROM: Mary W. Dove/Veneshe Ferebee-Vines 
Commission Secretary

DATE: August 12, 1999

SUBJECT: Corrected Statement of Reasons For MUR 4378

Attached is a copy of the Statement of Reasons in MUR 4378
signed by Chairman Scott E. Thomas and Commissioner Danny Lee
McDonald. This was received in the Commission Secretary's Office on
August 11, 1999 at 9:54 a.m.

cc: V. Convery

Attachments



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

In the Matter of)

National Republican Senatorial)
Committee, Stan Huckaby, as treasurer)

MUR 4378

STATEMENT OF REASONS

CHAIRMAN SCOTT E. THOMAS
COMMISSIONER DANNY LEE MCDONALD

At issue in MUR 4378 was whether the National Republican Senatorial Committee ("NRSC") exceeded the contribution limits of the Federal Election Campaign Act ("FECA" or "the Act") by disguising a negative advertising campaign against Senate candidate Max Baucus as so-called "issue advertising." After an extensive investigation into the matter, the Commission's Office of General Counsel recommended that the Commission find probable cause to believe the NRSC had violated the statutory limits. Three Commissioners (Elliott, Mason, and Wold) voted against the recommendation, and one Commissioner (Sandstrom) abstained. Because the NRSC advertising campaign was plainly "in connection with" the Senate campaign and there was clear evidence of coordination between the NRSC and the Republican Senate candidate in Montana regarding this advertising, we agreed with the Office of General Counsel's legal recommendations and voted to find probable cause the NRSC had violated the Act.

I.

In 1996, Senator Max Baucus was a candidate for re-election to the United States Senate from Montana. In late 1995, the National Republican Senatorial Committee indicated that it planned to run advertisements to "ensure that voters know that their Democratic Senator and Democratic Senate candidates 'raised taxes too much.' This is a great issue for the GOP because voters always suspected it was true." NRSC Press Release, October 19, 1995 (emphasis added). Elaborating on the NRSC's intent, the Executive Director of the NRSC indicated that "We're going to hammer the Democrats

who voted for this [a tax increase]." *Washington Times*, October 20, 1995. One of the Senators listed by the NRSC as a potential "target" of these ads was Senator Baucus.

Several months later, the NRSC began to run an extended advertising campaign—directed specifically to Montana voters—repeatedly attacking the Baucus campaign for its position on taxes. The first of these negative campaign ads began airing on Montana radio stations on April 16, 1996:

Liberal Max Baucus voted to raise his own pay, then voted to raise our taxes. He was wrong. While working families are having a tough time making ends meet here in Montana, Max Baucus is back in Washington giving himself a big pay raise, then voting to raise our taxes. Max Baucus increased his pay by more than \$23,000, then increased our taxes by more than \$2,600 per family. That's an outrage. Pay raises. . . higher taxes. That's not Montana - but it is Max Baucus.

Soon the Senate will vote on term limits - and the people of Montana support it. But not Max Baucus. In fact, he's already opposed term limits. It's just what you expect from a Senator who's been in Washington for twenty-one long, liberal years.

Call liberal Max Baucus. Tell him he was wrong to vote himself a big pay raise, then vote to raise our taxes. Tell him it's time to vote for term limits.

Paid for by the National Republican Senatorial Committee.

MUR 4378, May 24, 1996 Complaint at Exhibit A.

On April 25, 1996 the NRSC began airing another radio ad:

You already know that liberal Max Baucus voted to raise his own pay by \$23,000 then voted to raise your taxes by more than \$2,600 per family. But did you know that in the 21 long liberal years that Baucus has been in Washington, our debt skyrocketed to \$5 trillion.

It's a fact.

And still liberal Max Baucus refuses to consistently vote for a real balanced budget.

Instead, he's voted to spend billions more on wasteful government spending.

That's right. Billions more.

Liberal Max Baucus even voted to spend our tax dollars to pay for an alpine slide in Puerto Rico and a casino in Connecticut.

That's not Montana. But it is Max Baucus.

Call Liberal Max Baucus at (800) 332-6106. Tell him to stop wasting our hard earned money. Tell him to vote for Congress' balanced budget plan.

Paid for by the National Republican Senatorial Committee.

Id. at Exhibit B.

Another NRSC-financed radio advertisement attacking Max Baucus began to air on May 8, 1996:

The top movie is Godfather Part II.

Streaking becomes a national fad.

Max Baucus goes to Washington, and our national debt is \$484 million.

A lot's changed in 21 years - for example, Max Baucus' salary has more than tripled, from \$42,000 to \$133,000 a year. And the national debt has skyrocketed to \$5 trillion.

What have we gotten from Baucus' 21 long liberal years? More taxes and more debt. Liberal Baucus voted for five of the largest tax increases in American history. In one vote alone, he increased taxes on Montana families by \$2,600 a year.

Baucus even voted to raise taxes on Social Security, small businesses, and gasoline.

Call liberal Max Baucus. Tell him to balance the budget. Tell him he was wrong to raise taxes and spend us into debt. Tell him to vote for the majority's plan to balance the budget.

Paid for by the National Republican Senatorial Committee.

MUR 4378, November 13, 1998 General Counsel's Report at 16-17.

On May 12, 1996, the NRSC shifted from radio and began running television advertisements against the Baucus campaign:

VIDEO

AUDIO

GRAPHICS: 1974

1974

Baucus still

Liberal Max Baucus goes to Washington

GRAPHICS: Your share of national debt - \$2300.

Your share of the national debt - \$2300

22 long liberal years later. Government spending explodes.

GRAPHICS: 1996

Baucus votes for five of the biggest tax increases in history.

Headline on Spending.

GRAPHICS: Baucus votes for five of the biggest tax increases in American history.

GRAPHICS: Your share of national debt - \$19000.

Your share of the national debt - \$19,000.

MOVING UPWARD ARROW
AGAINST GRAPH LABELED
BAUCUS SALARY

What else is up?

Arrow ends at \$133,000

Baucus's salary. It's tripled to \$133,000.

We need a balanced budget.

Baucus pix.

GRAPHICS: Call Max Baucus/Phone
#??/Balance the Budget

Call liberal Max Baucus and tell him to support the majority's balanced budget plan.

Disclaimer

Id. at 17-18.

Less than two weeks later, on May 24, 1996, the NRSC began airing a different attack ad on television for Montana voters. The script read:

By one vote, the Senate passed the largest tax increase in history. That one vote - Max Baucus.

He voted for more taxes on Social Security, gasoline and family farms.

It's no surprise.

For twenty-two long liberal years, Baucus has spent our money and raised our taxes. He's the sixth biggest spender in the Senate.

Max Baucus - definitely a liberal.

Cal. Tell Baucus to vote for the majority's plan to balance the budget.

Id. at 18.

One week later, on May 31, 1996, the NRSC continued its attack on the Baucus campaign with another anti-Baucus advertisement on Montana television stations:

VIDEO

AUDIO

Music

Hand presses button to start tape recorder
Fuse lit and burns spread over video.

Announcer:
Good morning Mr. Phelps.

Hands pick up Baucus photo from manila file
folder marked TOP SECRET in block stencil

This is Max Baucus, liberal
from Montana.

Baucus disguises his record.

Hand flips to next piece of paper with
GRAPHICS: Max Baucus/Voted for 5 of the
Biggest Tax Increases in American History

Baucus voted for five of the
biggest tax increases in history.

Hand flips to piece of paper with GRAPHICS:
Max Baucus/Voted to Raise Taxes on: Social
Security/Family Farms (8/6/93)

Baucus voted to raise taxes on
Social security and family farms.

Tape recorder playing.

Your mission, which may be
impossible, is to get Baucus to
support the majority's balanced
budget plan.

Good luck, Jim.

Hand presses off button on tape recorder.

Announcer:

(800) 332-6106

Help Jim. Call liberal Max Baucus. This message will self-destruct in one second.

Disclaimer

Id. at 18-19.

On June 21, 1996, the NRSC ran one more attack ad against Senator Baucus on Montana television stations:

VIDEO

Scrolling list of Baucus votes for more taxes.

AUDIO

In his 22 long liberal years, Max Baucus has voted over fifty times to raise taxes.

Baucus even voted to raise taxes on Social Security, Medicare recipients, small businesses and the family farm.

Max, you can't hide from your record- you're definitely a liberal.

Call, tell Max Baucus to support the majority's plan to balance the budget and cut our taxes.

Id. at 19-20.

On May 31, 1996, Senator Baucus and his campaign organization, "Friends of Max Baucus '96'", filed a complaint with the Federal Election Commission. Specifically, the complaint alleged that the NRSC: (1) exceeded the 2 U.S.C. § 441a(d) limitations on coordinated party expenditures when it paid for the anti-Baucus radio and television advertising campaign; (2) used prohibited or excessive monies to pay for these advertisements in violation of 2 U.S.C. §§ 441b and 441a; and (3) failed to report these expenditures properly in violation of 2 U.S.C. § 434(b).

The Office of General Counsel prepared a report for Commission consideration that contained a factual and legal analysis of the complaint's allegations as well as the NRSC's response to the complaint. On June 17, 1997, the Commission approved the General Counsel's legal recommendations by a 5-0 vote and found reason to believe that the NRSC violated 2 U.S.C. §§ 441a(f), 434(b) and 441b, as well as 11 C.F.R. § 102.5(a). The Commission also approved the General Counsel's recommendation to conduct an investigation into the matter to verify the allegations of the complaint.

After a full investigation and review of the responses and materials submitted by the NRSC, the Office of General Counsel prepared a report for Commission consideration analyzing the pertinent factual and legal issues. The central finding of the General Counsel's office was that the three-month, anti-Baucus advertising campaign financed by the NRSC from April-June 1996, was "in connection with" the U.S. Senate race. The total cost of this advertising campaign was approximately \$309,292. The General Counsel's Report also found the anti-Baucus expenditures were coordinated with the campaign of Senator Baucus's Republican opponent Dennis Rehberg and his campaign committee, Montanans for Rehberg. As a result, the General Counsel recommended that the Commission find probable cause to believe the NRSC (1) violated 2 U.S.C. § 441a(h) by making a total of \$309,292 in coordinated expenditures on behalf of the Rehberg campaign; (2) violated 2 U.S.C. § 434(b) by misreporting the media campaign as allocable administrative costs/generic voter drive expenditures; and (3) paid for a portion of the advertising campaign from the NRSC non-federal account in violation of 2 U.S.C. §§ 441a(f) and 441b, as well as 11 C.F.R. § 102.5.

Motions to adopt the General Counsel's recommendations failed to secure the four affirmative votes necessary to make a probable cause to believe determination. 2 U.S.C. § 437g(a)(4). More specifically, the undersigned voted to support the General Counsel's recommendation regarding section 441a(h) and Commissioners Elliott, Mason and Wold opposed the motion. Commissioner Sandstrom abstained. Motions to approve the General Counsel's recommendations with respect to 2 U.S.C. §§ 434(b), 441a(f), 441b, as well as 11 C.F.R. § 102.5(a) also failed with Commissioners Thomas, McDonald and Sandstrom voting to support the General Counsel's recommendations and Commissioners Elliott, Mason, and Wold voting to oppose the recommendations.

II.

This enforcement matter is about the circumvention of the Act's contribution limitations by the NRSC. The Federal Election Campaign Act limits the contributions party committees may make to or on behalf of candidates for federal office. 2 U.S.C. § 441a. More specifically, section 441a(h) authorizes the "Republican or Democratic Senatorial Campaign Committee, or the national committee of a political party, or any combination of such committees" to contribute "not more than \$17,500" to a senatorial candidate. The NRSC, which is a political committee organized specifically to support Republican candidates in elections for the United States Senate, is subject to the section 441a(h) contribution limitation.

The Act also allows the national and state committees of the political parties to make "coordinated expenditures" in connection with the general election campaigns of the parties' candidates, but such expenditures may not exceed certain dollar limitations.

2 U.S.C. § 441a(d).¹ As noted by the Supreme Court in *Colorado Republican Federal Campaign Committee v. FEC* ("Colorado"), 518 U.S. 604, 610 (1996), this special provision for party committees is an exception to the § 441a contribution limitations. Although the NRSC is authorized by § 441a(h) to contribute up to \$17,500 to a candidate for election to the Senate, it is not authorized by § 441a(d) to make additional coordinated party expenditures on behalf of candidates for election to the Senate. The national and state party committees may authorize the NRSC, however, to expend their respective section 441a(d) allowance on their behalf. See *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27 (1981).²

In the 1996 race for United States Senate from Montana, the NRSC made full use of the contribution limit available to it. The NRSC made direct contributions totalling \$17,500 to the Republican Senate candidate, Montanans for Rehberg. The NRSC, however, could not make *any* section 441a(d) expenditures because the RNC had exhausted *both* the national and the state party section 441a(d) limitations. Apparently authorized by the state party committee to make expenditures against its limit, the RNC reported a total of \$122,000 in section 441a(d) expenditures.

Even these contributions and expenditures, however, were not enough. From April to June of 1996, the NRSC spent an additional \$309,292 on an advertising campaign meant to diminish support for the Baucus campaign. In other words, the amount of money spent on this springtime offensive against the Baucus campaign was

¹ Specifically, § 441a(d) provides in pertinent part:

- (3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure *in connection with the general election campaign* of a candidate for Federal office in a State who is affiliated with such party which exceeds—
 - (A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—
 - (i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or
 - (ii) \$20,000;

2 U.S.C. § 441a(d)(3)(emphasis added).

² The § 441a(d) coordinated expenditure allowance is considerably larger than the allowable contribution limit for a Senate race. For the 1996 elections, in the least populated states, the State party and national party were each entitled to spend \$61,820 under § 441a(d) for their Senate candidate. For their House candidates, each could spend \$30,910. See *FEC Record*, at 14-15 (April, 1996). With the coordinated expenditure and contribution limit provisions, Congress struck a reasonable balance between the need to encourage party activity and the need to prevent parties from becoming a vehicle for evading the limits on contributions to candidates. Without the limits on party spending, a group of persons could easily effect massive support on behalf of a particular candidate by contributing not only to the candidate but also to party committees likely to spend on behalf of such candidate. For example, a group of ten PACs might be coaxed by a House committee chairman to give \$15,000 each to a national party committee, but the coordinated expenditure limit would prevent the party from spending the full \$150,000 amount on ads sought by that chairman's reelection campaign.

more than double the amount of money which the NRSC and the RNC legally spent on the 1996 Senate campaign under sections 441a(h) and 441a(d).

In MUR 4378, we believe that the NRSC made excessive in-kind contributions of \$309,922 in violation of 2 U.S.C. § 441a(h). As the Office of General Counsel noted, because the coordinated expenditure allowance was used up, any additional coordinated expenditures were subject to the contribution limitations at section 441a(h). Accordingly, the \$309,922 can be analyzed properly as a violation of section 441a(h). In determining whether party communications are coordinated expenditures under section 441a(d) or in-kind contributions under section 441a(h), the legal analysis is essentially the same. In Advisory Opinion 1985-14, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5819, the Commission clarified that the section 441a(d) "in connection with" test would be applied.³ Moreover, the Commission has specified that an expenditure for generic activities like registration or get-out-the-vote-drives need not be attributed to individual candidates unless the expenditure is "made on behalf of a clearly identified candidate, and the expenditure can be directly attributed to that candidate." 11 C.F.R. § 106.1(c).

As we show below, the factual record in this matter demonstrates the anti-Baucus expenditures made by the NRSC were "in connection with" a federal election. 2 U.S.C. § 441a(d). And second, the evidence clearly shows the NRSC made these expenditures in coordination with the Rehberg campaign.

A.

Section 441a(d) provides that a national party committee may not make coordinated expenditures "in connection with" the general election campaigns of the parties' candidates beyond a certain dollar limitation. It is clear from the factual record that the NRSC advertising campaign against Senator Baucus was "in connection with" the general election for United States Senate. Indeed, the evidence indicates the anti-

³ In determining whether the NRSC advertisements were "in connection with" the election, the General Counsel's Report relied upon the Commission's analysis in Advisory Opinions 1984-15 and 1985-14. See, e.g., MUR 4378, General Counsel's Probable Cause Brief at 7-9, 50. We agree with the General Counsel's analysis in this regard. Two days after the Commission deadlocked on probable cause to believe in this matter, Commissioners Sandstrom, Elliott, Mason and Wold issued a statement indicating that they no longer agreed with a shorthand reference to the legal analysis contained in those opinions—"electioneering message." In reaching this conclusion, they did not address those cases where the courts have expressly used the "electioneering message" phrase. See, e.g., *Democratic Congressional Campaign Committee v. FEC*, 645 F.Supp. 169, 175 (D.D.C. 1986), *aff'd in part and remanded*, 831 F.2d 1131 (D.C. Cir. 1987) ("I find that the NRCC mailer conveys an 'electioneering message' as defined by the FEC's own Advisory opinions and as interpreted by its General Counsel. Thus, the FEC's dismissal of the plaintiff's complaint was contrary to law."); *FEC v. Colorado Republican Federal Campaign Committee*, 59 F.3d 1015, 1022 (10th Cir. 1995) (Court of Appeals expressly deferred to the Commission's long-standing "construction of § 441a(d) as regulating political committee expenditures depicting a clearly identified candidate and conveying an electioneering message . . ."), *reversed on other grounds*, 518 U.S. 604 (1996).

Baucus advertisements financed by the NRSC were designed specifically to diminish support for the Baucus campaign.

In a candidly-worded press release issued on October 19, 1995, the NRSC bluntly stated that it intended to target certain Democratic Senators with negative campaign ads in connection with the 1996 Senate elections. Under the heading, "GOP SENATE CAMPAIGN COMMITTEE PREPARING TO USE CLINTON "TAXED TOO MUCH" COMMENT IN 1996 SENATE RACES," John Heubusch, Executive Director of the NRSC, stated "[w]e plan on letting voters know their Senator supported the Clinton tax increase and, that now, the President said the tax increase was too big." September 2, 1997, Response of Dennis Rehberg to Document Request (emphasis added). The NRSC Press Release expressly indicated that "[p]ossible ad targets include Senator[] Max Baucus/MT...." *Id.* Mr. Heubusch promised that:

We will ensure that voters know their Democratic Senator and Democratic Senate candidates 'raised taxes too much'. This is a great issue for the GOP because voters always suspected it was true—and now the President has himself confirmed it.

Id. (emphasis added). Elaborating for the *Washington Times*, Mr. Heubusch explained "We're going to hammer the Democrats who voted for this and ask them if they are going to apologize too. He's [President Clinton] created a great 1996 election issue." *Washington Times*, October 20, 1995 (emphasis added).

Fulfilling its promise, the NRSC began to run ads "hammering" the Baucus campaign over the tax issue in April, 1996. The NRSC advertising ran for three months and repeatedly emphasized the tax theme: "Pay raises...Higher taxes. That's not Montana - but it is Max Baucus." April 16, 1996 ad; "liberal Max Baucus. . .voted to raise your taxes by more than \$2600 per family," April 25, 1996 ad; "Liberal Max Baucus voted for five of the largest tax increases in American history," May 8, 1996 ad; "Baucus votes for five of the biggest tax increases in American history," May 12, 1996 ad; "For twenty-two long liberal years, Baucus has spent our money and raised our taxes." May 24, 1996 ad; "Max Baucus, liberal from Montana. . .voted for five of the biggest tax increases in history." May 31, 1996 ad; and "In his 22 long liberal years, Max Baucus has voted over 50 times to raise taxes. June 21, 1996 ad. Moreover, none of the election-year ads mentioned any specific Senate legislation—either by bill number or reference to an upcoming legislative vote. We believe that the anti-Baucus advertising campaign financed by the NRSC should be recognized for what it was—a series of expenditures made "in connection with" the 1996 Senate election under 2 U.S.C. § 441a(d).

Reinforcing our conclusion is the simple fact that the goal of a political party committee such as the NRSC is to do everything it can to help its candidates win elections. The Supreme Court recognized this when it described the NRSC as "a political committee organized specifically to support Republican candidates in elections for the

United States Senate." *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 29 (1981)(emphasis added). Similarly, the Act reflects this basic understanding when it defines "political party" solely in election-related terms:

The term "political party" means an association, committee, or organization which nominates a candidate for election to any federal office whose name appears on the election ballot as the candidate of such association, committee, or organization.

2 U.S.C. § 431(16). In addition to the Supreme Court, other courts have recognized that "[t]he party's ultimate goal . . . is to obtain control of the levers of government by winning elections. . . ." *Nader v. Schaffer*, 417 F.Supp. 837, 844 (D. Conn. 1976). *aff'd mem.*, 429 U.S. 989 (1976). See also *Rosario v. Rockefeller*, 458 F.2d 649, 652 (2d Cir. 1972), *aff'd*, 410 U.S. 752 (1973)(political party composed of "individuals drawn together to advance certain aims by nominating and electing candidates who will pursue those aims once in office"). Indeed, the standard dictionary definition of "party" is "an organized group which tries to elect its candidates to office." Webster's New World Dictionary (1966). Significantly, under tax rules, the NRSC must concede that its *primary* purpose is attempting to influence the selection of public or political officials. 26 U.S.C. § 527(e)(1), (2). We have no doubt the NRSC, as a political party committee, ran its anti-Baucus advertising campaign in order to elect its candidate to office.

Our finding that the NRSC advertisements were campaign-related is consistent with the Commission's recent decision in MUR 3918. There, the Commission found certain radio advertisements run by Hyatt Legal Services ("the Firm") constituted excessive contributions to the United States Senate campaign of Democratic candidate Joel Hyatt. The basis for the Commission's unanimous finding was that the Firm's advertisements were coordinated with the candidate and referred to issues raised in the campaign. The Commission made this finding (and extracted a civil penalty) even though the ads did not mention the name or contain a picture of or make any reference to Mr. Hyatt's opponent; nor, for that matter, was the name "Joel Hyatt" or the candidate's picture similarly seen in the advertisement. The Commission having found that the Hyatt Legal Services advertisements were campaign-related, it is difficult to understand how some Commissioners found the anti-Baucus ads run by the NRSC—ads designed to "hammer" the Baucus campaign-- were *not* made "in connection with" the election.

B.

The Supreme Court in *Colorado* determined political parties are capable of making "independent" expenditures on behalf of their candidates for federal office and that such expenditures are not subject to the coordinated expenditure limits found at section 441a(d). In so ruling, the Court rejected a Commission regulation which presumed coordination between political parties and their candidates. See 11 C.F.R.

§ 110.7(b)(4)(1996). As a result, a political party expenditure is covered by § 441a(d) only if it has been "coordinated" with a candidate.

Having concluded that political party committees could make independent expenditures, the Court in *Colorado* was faced with the issue of whether the expenditures made by the Colorado Republican Party actually were "independent." In light of the presumption of coordination, it is not surprising there was little factual development done on this point and, as a result, the record was sketchy at best. The most that could be said for coordination was that the State Party Chairman admitted, as a general proposition, that "it was the practice of the party to 'coordinat[e] with the candidate' 'campaign strategy.'" 518 U.S. at 614. The State Chairman also acknowledged he tried to be "as involved as [he] could be" with the individuals seeking the Republican nomination by making available to them "all of the assets of the party," *Id.* There was, however, no mention of any candidate involvement with respect to the specific anti-Wirth advertising campaign undertaken by the party committee.

Consequently, the State Chairman's statements were dismissed quickly by the Court as "general descriptions of party practice. . . . [that] do not refer to the advertising campaign at issue here or to its preparation." *Id.* Moreover, the Court found they did not "conflict with, or cast significant doubt upon, the uncontroverted direct evidence that this advertising campaign was developed by the Colorado Party independently and not pursuant to *any general* or particular *understanding* with [the candidates and their agents]." *Id.* (emphasis added). As a result, the Court treated the party committee's "expenditures, for constitutional purposes, as an 'independent' expenditure, not an indirect campaign contribution." *Id.*

By contrast, it is clear that the NRSC anti-Baucus advertising campaign was developed pursuant to at least a "general . . . understanding" of the Rehberg campaign's needs. Indeed, unlike the *Colorado* case, the instant matter contains clear evidence of involvement on the part of the Rehberg campaign with respect to a specific advertising campaign undertaken by the NRSC.

Soon after the NRSC issued its October 19, 1995 Press release targeting Max Baucus (a copy of which had been faxed to the Rehberg campaign), representatives of both the NRSC and the Rehberg campaign met to discuss the campaign. Representing the NRSC was Jo Anne Barnhart who served as political director of the NRSC during 1995-1996 election cycle. Representing the Rehberg campaign was LaDonna Lee whose political consulting firm was hired as strategic consultants by Montanans for Rehberg. One of the firm's responsibilities for the Rehberg campaign was to act as liaison with the NRSC, where the principal contact for the campaign was Jo Anne Barnhart.

When asked during her deposition if receipt of the NRSC press release triggered her conversation with Ms. Barnhart, Ms. Lee answered that "[t]his informed us that they were looking at doing [an] ad campaign, yes." MUR 4378, General Counsel's Report at 37. At their meeting, Ms. Lee specifically recalls discussing with Ms. Barnhart the

advertising campaign which the NRSC was planning "on Mr. Baucus' voting record and votes that he was facing." *Id.* Moreover, it appears that the NRSC specifically described the content of the advertising program against Senator Baucus:

Q. Did she [Ms. Barnhart] talk about specifics as to what issues they were planning to address in that program?

A. His voting records in terms of how it was or was not in support of what Montana was, generally.

Id.

Having discussed the content of the ads with the NRSC, the Rehberg campaign then suggested that the proposed advertisements be run. According to a memorandum prepared by Ms. Lee, which she termed a "recap" of her campaign meeting with Ms. Barnhart, Ms. Lee wrote under the heading "State Party":

The party is going to undertake a message program showing MB [Max Baucus] out of touch w/Montana. *Our recommendation is a series of radio ads starting ASAP telling MT that Max has already voted against their cut in taxes, reducing government, etc.* The messages will then be adapted depending upon the news cycle. *Jo Anne said they have \$35,000 to begin the program with and could spend over \$100,000 between now and the beginning of the year.*

MUR 4378, General Counsel's Report at 39 (emphasis added).⁴

This acknowledged consultation between the NRSC and the Rehberg campaign, and the recommendation made by an agent of the Rehberg campaign that a series of attack ads regarding taxes be run against the Baucus campaign, appears to lie at the heart of what constitutes coordination. The Act explicitly states that expenditures made "in cooperation, consultation, or concert with, or *at the request or suggestion of, a candidate*, his authorized political committees, *or their agents*, shall be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i)(emphasis added). Similarly, § 431(17) defines "independent expenditure" as:

⁴ It may be that the Rehberg campaign's "recommendation" was made originally in the hopes that the State Party would be able to carry out this ad campaign by using its § 441a(d) allowance. For example, Ms. Barnhart's reference to the "over \$100,000" that could be spent on the advertising campaign corresponds roughly to the \$123,640 available to the state party if authorized by the national party under § 441a(d). When asked during his deposition about Ms. Lee's memorandum, Mr. Rehberg testified that this "was Ladonna's recommendation to me that if the state party did do this, this is what she would like to see done. The state party did not do this." *Id.* Whether or not Ms. Lee hoped the State Party would do this, it is clear she was conveying a positive suggestion to the NRSC representative who had indicated the NRSC would undertake such an effort. More likely, Mr. Rehberg's construction is an effort to undermine the memo's reference that "*Jo Anne said they have \$35,000 to begin the program.*"

[A]n expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or *at the request or suggestion of*, any candidate, or any authorized committee or agent of such candidate.

2 U.S.C. § 431(17)(emphasis added). Likewise, § 109.1(b)(4)(i) of the Commission's regulations explains an expenditure is not considered independent if there is "[a]ny arrangement, coordination or direction by the candidate or his . . . agent prior to the publication, distribution, display or broadcast of the communication." 11 C.F.R. § 109.1(b)(4)(i)(emphasis added). The regulations further state that an expenditure is presumed not to be independent if it is:

(A) *Based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate's agents, with a view toward having an expenditure made;*

11 C.F.R. § 109.1(b)(4)(i)(A)(emphasis added).

It seems clear that the Rehberg campaign's "recommendation" to the NRSC constitutes a "request" or "suggestion" or "information about the candidate's . . . needs provided . . . with a view towards having an expenditure made" which transforms an expenditure into a contribution. Where an agent of the Rehberg campaign makes a "recommendation" to the NRSC to air certain ads dealing with a specific issue and attacking a specific candidate, and the NRSC later runs those specific ads, the expenditures for those advertisements should "be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i).

Further evidencing coordination between the NRSC and the Rehberg campaign on the anti-Baucus tax ads, the factual record reveals the Rehberg campaign repeatedly pressed the NRSC's representative on whether (and, if so, when) the ads would be run. In her deposition, Ms. Lee specifically recalled later contacts on the subject of whether the NRSC ever would carry out the requested advertising campaign—contacts evidencing the Rehberg campaign's desire for aid and assistance:

Q. Were there any other discussions that you had with Jo Anne Barnhart, or anyone else at the NRSC, following those fall discussions about the ad campaign that they were planning for Montana?

A. *The only other specific discussions were primarily centered around was it ever going to happen.* I know that there were conversations

about—from the state party chairman of great frustration. They had been told by Jo Anne that it was going to happen. It wasn't happening. *So there was discussions regarding the lack of, as opposed to any specifics.* After a certain amount of months you kind of figure it was one more thing that was intended but hadn't happened.

Id. at 40 (emphasis added). Given its persistence, there is little question the Rehberg campaign wanted these advertisements aired. Of course, the NRSC aired this extensive advertising campaign only after continued requests and inquiries from the Rehberg campaign to the NRSC's political director. Rather than airing these ads as part of legally-permissible coordinated state party expenditures under § 441a(d), however, the ads were run outside the § 441a(d) limitations and disguised as so-called legislative issue ads.

In finding that coordination existed in this matter, we note the Commission has not accepted the argument of some that coordination cannot exist absent candidate approval of specific ad text, as well as the timing and placement of the ad. Obviously, such a narrow view of coordination would open a large loophole in the statute. Under such a restricted definition, an organization could meet with a candidate's campaign, discuss campaign strategy and the development of issues crucial to the campaign, and then make "independent" expenditures based on this detailed knowledge. The only apparent restriction would be the campaign could not approve the final, finished ad or actually authorize or approve a buy for the timing and placement of the ad. This narrow, limited approach would render the coordination standard meaningless.⁵

Fairly recently, in MUR 4116, the Commission unanimously found probable cause to believe that coordination existed between the Senate campaign of Democratic candidate Charles Robb and the National Council of Senior Citizens ("NCSC") despite the fact there was no concrete evidence the Robb campaign specifically authorized or approved either the specific text of the NCSC ads or their timing and placement. In fact, the campaign broadly denied any coordination with NCSC regarding the advertisements. Even though there was no specific evidence of coordination regarding specific advertisements, apparently the Robb campaign and the NCSC had a "general understanding." *Colorado*, 518 U.S. at 614, regarding the development of an advertising campaign financed by NCSC's political action committee. The campaign's request for an endorsement from NCSC, coupled with discussion of message content at a joint press conference, provided evidence that the candidate's campaign had discussed the general content of the ads and that it would like to see the ads run.

⁵ The recent decision in *Federal Election Commission v. The Christian Coalition*, 1999 WL 569491 (D.D.C., Aug. 2, 1999), would not suggest a result different from that we propose. Surely, the multiple requests or suggestions of the Rehberg campaign's agent would constitute "substantial discussion or negotiation" that would render the Rehberg campaign a 'partner or joint venturer.' *Id.*

In our view, there seems to be little difference between MUR 4116 and MUR 4378. As in MUR 4116, the Rehberg campaign discussed the content of the advertisements with the NRSC and plainly suggested the ads should run. Yet, for some reason, while there were votes to find coordination and find probable cause against the Robb Committee, there was not a majority to proceed against the National Republican Senatorial Campaign Committee.⁶

III.

Because we believe the NRSC's expenditures for its anti-Baucus advertisements constituted contributions to the Rehberg campaign, we also believe the NRSC violated the reporting provisions and prohibitions of the Act.⁷ The NRSC reported its expenditures for its anti-Baucus advertisements as allocable "administrative/voter drive" expenses. Instead, the NRSC should have reported its expenditures either as coordinated party expenditures pursuant to §441a(d) or as in-kind contributions pursuant to 2 U.S.C. § 441a(h). By misreporting its contributions to the Rehberg campaign, the NRSC violated 2 U.S.C. § 434(b).

Moreover, by characterizing its advertisements as allocable "administrative/voter drive" activity, it appears that non-federal funds were used to pay portions of the expenditures allocated to non-federal activity. The NRSC reported spending at least \$309,292 on the advertisements. Since the NRSC's allocation formula for 1996 was 65% federal / 35% non-federal, it appears that the NRSC made payments from its non-federal account totaling \$108,252. Since non-federal accounts contain funds which are prohibited under the Act or exceed the Act's contribution limitations, the NRSC violated 2 U.S.C. §§ 441a(f) and 441b. In addition, by using a non-federal account to make federal election-related expenditures, the NRSC also violated 11 C.F.R. § 102.5.

⁶ Nor, unfortunately, is this unusual. It is hard to square the many cases where coordination findings have been blocked with those cases where there has been a majority to proceed. See MUR 2272 (American Medical Association Political Action Committee and Williams for Congress Committee); MUR 2766 (Auto Dealers and Drivers for Free Trade PAC and Friends of Connie Mack); MUR 3069 (National Security Political Action Committee and Bush-Quayle '88); MUR 4204 (Americans for Tax Reform and Lewis for Congress); MUR 4282 (Archdiocese of Philadelphia and Santorum '94); and now, MUR 4378 (NRSC) where coordination findings were blocked. Compare MUR 3918 (Hyatt for Senate Committee), MUR 4116 (Robb for Senate Committee), and MUR 2788 (Commission found coordination when Dukakis campaign told "independent" spender that its exhausted print budget prevented it from running spender's proposed ad idea, "Listen to the Heart-Ache/Heart-Break of America/Reach Out/Vote Dukakis/Bentsen!", but suggested that spender was free to take out his own ad in the *New York Times*).


⁷ Although he did not join us and find that the NRSC made excessive in-kind contributions to Montanans for Rehberg in violation of 2 U.S.C. § 441a(h), Commissioner Sandstrom, nevertheless, did agree with us regarding the violations of 2 U.S.C. § 434(b) as well as the violations of 2 U.S.C. §§ 441a(f) and 441b as well as 11 C.F.R. § 102.5.

IV.

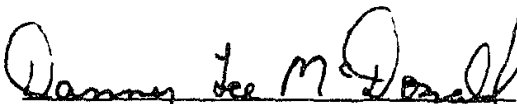
In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court upheld the limits on contributions to federal candidates but ruled that a similar ceiling on independent expenditures was unconstitutional. In so ruling, the Court recognized the many opportunities for evasion of the contribution limits created by its holding. Thus, the *Buckley* Court drew a specific distinction between expenditures made "*totally independently* of the candidate and his campaign" and "*prearranged or coordinated expenditures* amounting to *disguised contributions*" which could be constitutionally regulated. 424 U.S. at 47 (emphasis added).

Clearly, the NRSC's expenditures which financed the anti-Baucus advertising campaign were not made "*totally independently*" of the Rehberg campaign. The factual record establishes that the NRSC advertisements, designed to "*hammer*" the Baucus campaign, were "*recommended*" by the Rehberg campaign and run by the NRSC after repeated inquiries by the Rehberg campaign. As such, these "*coordinated expenditures*" constituted "*disguised contributions*" by the NRSC to the Rehberg campaign. The Commission should have enforced the contribution limitations of the Act against the NRSC in this matter. Its failure to do so, in the face of overwhelming evidence, is squarely contrary to law.⁸

8/10/99
Date


Scott E. Thomas
Chairman

8-10-99
Date


Danny Lee McDonald
Commissioner

⁸ Along these lines, it is important to note that as of August 10, 1999, the four Commissioners who did not accept the General Counsel's § 441a(h) recommendation still have not filed a Statement of Reasons explaining their June 22, 1999 votes. In such circumstances, the D.C.Circuit has explicitly required that the "declining-to-go-ahead Commissioners" file such a Statement of Reasons. *Common Cause v. FEC*, 842 F.2d 436, 439 (D.C.Cir. 1988). Moreover, the Commission's Regulations explicitly require that these opinions "will be made available no later than 30 days from the date on which a respondent is notified that the Commission has voted to take no further action and to close such an enforcement file." 11 C.F.R. § 5.4(a)(4). The Commission unanimously reaffirmed this principle by adopting internal guidelines which state: "The deadline for completion of the statement will be the 30-day time period following notification to the respondent at which time the entire file of the closed MUR will be released to the public." FEC Open Meeting Minutes at 7 (February 5, 1987). In MUR 4378, these letters were sent out on June 29, 1999. Failure to file a Statement places complainants, who may wish to exercise their statutory rights under 2 U.S.C. § 437g(a)(8), in the untenable position of not knowing the reasoning of the "declining-to-go-ahead Commissioners" and thus, whether their failure to proceed is contrary to law.